SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1965
No. 1089

LORETTA L. FORD, also known as LORETTA L. PHELAN,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

On Appeal From the District Court of the State of California, Fourth Appellate District.

JURISDICTIONAL STATEMENT.

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THE PEOPLE OF THE STATE OF CALIFORNIA.

On Appeal From the District Court of the State of California, Fourth Appellate District.

JURISDICTIONAL STATEMENT.

Opinions Below.

No written opinion was rendered by the trial court, Superior Court of the State of California, for the County of Orange. Minute orders of the trial court relating to the conviction and sentence appear at pages 172 and 174 of the Clerk's Transcript sent up from the Court below and in Appendix A, *infra*. The opinion of the District Court of Appeal of the State of California, Fourth Appellate District, affirming the trial court judgment, is reported in 236 A.C.A. 488 and set forth in Appendix B, *infra*.

Jurisdiction.

Appellant was charged with four counts of grand theft in violation of Sections 484-487 of the California Penal Code as a result of her receipt of welfare fund payment (then called Aid to Needy Children or ANC payments) made to her for the support of herself and her seven minor children. The charges were based on *ex post facto* computations showing prior payments to have been in part overpayments. The existence, amount and allegedly larcenous character of these overpayments were wholly dependent on the application of Section 1508 of the California Welfare and Institutions Code, as amended in 1961,[1] and rules and regulations of the California State Department of Social Welfare adopted thereunder. She was found guilty but the trial judge considered the computations to be legally so restricted as to limit the convictions to misdemeanor rather than felony status. She was sentenced to serve six months in the county jail on each of the four counts, the sentences to run consecutively with one day suspended. On appeal to the District Court of Appeal of the State of California, Fourth Appellate District, the trial court judgment was affirmed by opinion filed August 9, 1965, which appears in Appendix B, *infra*,[2] and which became final upon denial of a petition for hearing thereof by the Supreme Court of the State of California on October 7, 1965. Appellant filed her notice of

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[1]The section now appears with slight changes in the same code as section 11351 after 1965 amendments.

[2]According to computations set out in the opinion it would appear the appellate court believed felony convictions would have been supported. However, under California law the trial judge had discretion and authority to impose a misdemeanor sentence even where a felony sentence was legally permissible.

appeal to the Supreme Court of the United States on January 4, 1966. Appellant is at liberty on her own recognizance pending determination of the appeal.

Jurisdiction to review by appeal a judgment of the highest court of a state in which a decision could be had is conferred on this Court by 28 U.S. Code, Sections 1257(2) and 2101(d) and Rule 11.(1.) of this Court. That such jurisdiction exists in the circumstances of this case is sustained by the following decisions; *Dahnke-Walker Milling Co. v. Bondurant,* 287 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239; *Robinson v. State of Florida,* 378 U.S. 153, 84 S. Ct. 1693, 12 L. Ed. 2d 771; *Speiser v. Randall,* 357 U.S. 513; 78 S. Ct. 1332, 12 L. Ed. 2d 1460; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584; *Near v. State of Minnesota,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357; *Hamilton v. Regents of University of California,* 293 U.S. 245, 55 S. Ct. 197, 79 L. Ed. 343; *Staub v. City of Baxley,* 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302; *Jamison v. State of Texas,* 318 U.S. 413, 63 S. Ct. 669, 87 L. Ed. 869; *Hoeper v. Tax Commission of Wisconsin,* 284 U.S. 206, 52 S. Ct. 120, 76 L. Ed. 248; *Shelton v. Tucker,* 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231; *Torcaso v. Watkins,* 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 382; *Cramp v. Board of Public Instruction,* 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285; *Wiemann v. Updegraf,* 344 U.S. 183, 73 S. Ct. 215; 97 L. Ed. 216; *Sherbert v. Verner,* 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965; *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653; *Thompson v. City of Louisville,* 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654; *Flournoy v. Wiener,* 321 U.S. 253, 64 S. Ct. 548, 88 L. Ed. 708.

Statute Involved.

Section 1508 of the California Welfare and Institutions Code as amended in 1961, reads as follows:

"Computation of aid; consideration of stepfather's income; support by stepfather

Where a needy child as defined in this chapter lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 1511 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person. The county granting aid shall determine if the stepfather or such adult male person is able to support the child either wholly or in part. Said determination shall be based upon a standard which takes into account the stepfather's or such adult male person's income and expenses under regulations set forth by the State Board of Social Welfare.

Notwithstanding the provisions of Section 209 of the Civil Code, a stepfather or such adult male person is bound to support, if able to do so, his wife's children if without support from such stepfather or adult male person they would be needy children eligible for aid under this chapter. However, such liability for support shall not exceed the wife's community property interest in his income.

A natural father is not relieved of any legal obligation to support his children by the liability for their support imposed upon their stepfather by this section.

As used in this section, 'adult male person' means any male person of age 18 years or older. (As amended Stats. 1961, c. 2105, p. 4369, Section 1.)"

State Department of Social Welfare Regulation C-155 in effect during the relevant times involved, read as follows:

"1. The stepfather is responsible to the extent of his ability for the support of the mother and her needy children when living in the home with the children and the children's mother.

2. A man assuming the role of spouse to the mother of the needy child has the same responsibility as that of a stepfather for the mother and the needy children."

Questions Presented.

The following questions are presented by this appeal:

1. Whether under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, Section 1508 of the California Welfare and Institution Code as amended in 1961 and in effect during relevant prior times and during the prosecution and conviction of appellant herein was unconstitutional and void for vagueness.

2. Whether under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, Section 1508 of the California Welfare and Institutions Code as amended in 1961, including implementing rules and regulations of the California State Department of Social Welfare

adopted thereunder, was unconstitutional and unconstitutionally applied to appellant as a mother receiving aid for her needy children where the effect thereof was to reduce the amount of such aid by the entire Department determined net income of an adult male assuming the role of spouse to the mother without any right in anyone to show his actual contribution, if any, to the mother or the needy children, but in all respects applying to appellant a conclusive and irrebutable presumption of knowledge and receipt of such income and wholly applying such net income as a set off in reduction of aid to needy children payments which would otherwise be made or had been made.

3. Whether under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, Section 1508 of the California Welfare and Institutions Code as amended in 1961 was unconstitutional and unconstitutionally applied to appellant as a mother receiving aid to needy children where the statute and the implementing rules, regulations and practice thereunder resulted in applying to appellant the presumption of receipt of support money for herself and her children from a man assuming the role of spouse to her without legal obligation to support her or her children and without her having any legal interest in his income in the identical manner and to the same extent that the presumption was applied to a mother with a legal, vested interest in the community income of herself and her husband and where the husband had a legal duty to support her and her children.

4. Whether under the due process and equal protection clauses of the Fourteenth Amendment to the Con-

stitution of the United States, Section 1508 of the California Welfare and Institutions Code, as amended in 1961, including its implementing rules and regulations, was unconstitutional and unconstitutionally applied to appellant as a married mother with needy children where her preexisting marriage rendered impossible any question of assumption of a common law marriage even under California law in effect when common law marriages were recognized.

5. Whether under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, Section 1508 of the California Welfare and Institutions Code as amended in 1961 with its associated rules and regulations was unconstitutional and unconstitutionally applied to appellant where the effect was to make her eschew any association with an adult male or at her peril chance such association with the attendant risk of loss of aid to needy children payments as well as imposition of criminal sanctions based on her error in evaluating the meaning and consequences of a "role" assumed by another person.

6. Where a prosecution on four counts of grand theft in connection with receipt of welfare funds by appellant as a mother of needy children required proof that the needy children lived with their mother and an undisclosed adult male person assuming the role of spouse to their mother during the eight months' period August, 1963, to March, 1964, inclusive, and specifically on the 1st day of each month of such period, under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the

United States could a conviction on each of the four counts be sustained in the entire absence of proof of the following essentials to conviction:

(a) Place of residence of the needy children during the pertinent times.

(b) Place of residence of their mother during the pertinent times and that it was the same as that of the children.

(c) Place of residence of the undisclosed adult male during the pertinent times and that it was the same as that of the mother and children.

(d) Age of the adult male person during the pertinent times. (Under the statute involved, set out *supra,* "adult male person" means any male person of age 18 years or older.)

(e) That the undisclosed adult male person assumed the role of spouse to the mother of the needy children during the pertinent times?

7. Where the California law of theft by false pretense includes as an indispensable element proof that the person or entity parting with the money or other consideration to the person charged does so in reliance (partial or total) on the false pretense, and where in the instant case the only applicable asserted false pretense was contained in the printed eligibility form signed by appellant on December 28, 1962, and the statutory law and welfare department rules and practice required a written re-determination of eligibility every six months and there was prosecution testimony that a written re-determination was obtained at least in December, 1963, but none was introduced in evidence, nor any evidence of its contents, and the prosecuting

attorney stated his intention to call a witness from the welfare department to establish the element of reliance but no such witness was ever called nor any evidence regarding reliance introduced and the eight asserted overpayments were made for the period August, 1963, to March, 1964, inclusive, under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States can the convictions on the four counts of theft stand in the absence of proof of an essential element of the crime?

8. Where a prosecution for theft by false pretense encompassed eight successive monthly aid to needy children payments to appellant and was based on an alleged false pretense consisting of a promise made with no intention of keeping it made more than seven months prior to the earliest of the monthly payments, was it a denial of due process of law and of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States to allow the prosecution to maximize charges and penalties by making four grand theft felony counts of the eight payments rather than eight misdemeanor petty theft counts or one grand theft count?

9. Where it was and is the settled law of the State of California that a conviction under a prosecution for theft by false pretense consisting of a promise made with no intention of keeping it cannot be sustained by mere proof of the breach of the promise as in a civil case, but that additional evidence of conduct inconsistent with the performance of the promise is required, under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States could the State of California

constitutionally omit this requirement of additional objective evidence in the prosecution and conviction of appellant for alleged theft of aid to needy children funds based on a false pretense consisting of a promise made with no intention of keeping it?

10. Where a charge of theft by false pretense consisting of a promise made with no intention of keeping it was predicated on the asserted breach of promise of appellant to report an adult male person's return to the home was it constitutionally permissible under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States to permit a conviction only where such adult male person was proved to have a net income to be set off against welfare payments and not where there was no such net income, the promise being the same in either case?

11. Whether under the due process of law and equal protection of the laws provisions of the Fourteenth Amendment to the Constitution of the United States, the State of California in administering its aid to needy children program through the State Department of Social Welfare could constitutionally forbid appellant as a mother receiving aid for her needy children from accepting a man as a paid roomer in the house under penalty of having him treated as an adult male assuming the role of spouse to her and thereby having her aid payments recomputed and reduced by the amount of his departmentally determined net income without regard to what if anything he paid her.

12. Whether under the due process of law and the equal protection of the laws clauses of the Fourteenth

Amendment to the Constitution of the United States, the State of California in administering its Aid to Needy Children program could constitutionally regulate the moral behavior and associations of appellant as an aid applicant or recipient, or require information from her other than direct answers to questions of need, resources and income.

13. Whether under the due process of law and the equal protection of the laws provisions of the Fourteenth Amendment to the Constitution of the United States and under the Fifth Amendment to such Constitution, the State of California in administering an Aid to Needy Children program could constitutionally require appellant as a married applicant mother of needy children to waive or agree to waive the privilege against self-incrimination afforded by the Fifth Amendment to the United States Constitution by making her agreement to furnish information in violation of such privilege a condition precedent to the receipt of such aid, and upon her failure to furnish such information subjecting her to criminal prosecution as here occurred.

14. Any denial of federal right whether or not capable in itself of being brought before the United States Supreme Court by appeal either contained in the foregoing questions or other and in addition thereto.

Statement.

Appellant and one Anthony Vitone were charged jointly with four counts of grand theft based on appellant's asserted breach of promise to notify the welfare department that said Vitone had "returned" to the home, and necessarily based on the further requirement that during the pertinent eight months' period

when Aid to Needy Children payments were made to appellant her seven children lived with her and said Vitone while he assumed the role of spouse to her, was eighteen years or older, and had net income as determined by welfare department regulations. The amount of each ovepayment asserted to be larcenous in character was obtained by *ex post facto* computations under welfare department rules which resulted in monthly net income figures for Vitone. It was charged and in effect conclusively presumed that in the case of the eight monthly payments involved appellant had feloniously obtained that portion of each which was equal to the later computed total net earnings of Vitone for the corresponding periods. The four counts were formed by merging successive bi-monthly periods into one count. Appellant was married to one William Ford during the periods under consideration. He was serving a sentence under a family non-support conviction. Under applicable California law if appellant lived in a husband-wife relationship with a man other than her husband she was subject to prosecution for adulterous cohabitation under Section 269a of the California Penal Code. If such relationship existed in a household of minor children she was subject to prosecution for encouraging or contributing to the delinquency of persons under 21 years of age under Section 272 of the California Penal Code.

A preliminary hearing was had for both defendants. Both were held to answer for trial in the Superior Court. Defendant Vitone, however, moved under California Penal Code Section 995 to set aside the information on the grounds that he had been committed without reasonable or probable cause. The motion was

granted. He disappeared from the case. Appellant proceeded to trial in the Superior Court where the matter was handled by submission on the transcript of the preliminary hearing without any further evidence. Appellant was found guilty and sentenced to serve consecutive sentences of six months on each of the four counts with one day suspended. She is at liberty on her own recognizance pending the outcome of this appeal.

The constitutional questions were raised at all stages of the proceedings in all courts. In California the rule is:

> "An unconstitutional statute goes to the very jurisdiction of the court, and hence may be attacked at any stage of the proceedings."
>
> *Alves v. Justice Court,* 148 Cal. App. 419, 425.

Objections based on unconstitutionality of said Section 1508 and violation of the constitutional rights of the defendants under the Fourteenth Amendment to the Constitution of the United States appear at page 145, line 8 to page 146, line 21 of the Clerk's Transcript of the preliminary hearing. These objections were automatically reiterated at the time of trial in the Superior Court since the case was submitted on this transcript. Argument of counsel was not reported but appellant's counsel also orally argued unconstitutionality. The trial judge made a brief comment upholding constitutionality. [Rep. Tr. p. 4, line 22, to p. 5, line 5.]

In pages 22 to 43, inclusive, of Appellant's Opening Brief in the California District Court of Appeal, appellant contended that California Welfare and Institutions Code, Section 1508 was unconstitutional and unconstitutionally applied to her under the circumstances of the case under the Fourteenth Amendment to the

Federal Constitution as well as under applicable provisions of the California Constitution. Reference was again made to constitutional deficiencies at pages 8 and 9 of Appellant's Reply Brief in the District Court of Appeal.

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (June 15, 1964), which made the privilege against compulsory self-incrimination of the Fifth Amendment to the Federal Constitution applicable to the states under the Fourteenth Amendment of the Federal Constitution had not been decided at the time of the preliminary hearing in this case. Its existence and effect were noted at pages 5-6 in Appellant's Petition for Rehearing in the District Court of Appeal. On pages 13-14 of that petition, appellant discussed the unconstitutional discrimination inherent in the statute in light of the holding of the appellate court. Again, and finally, in appellant's Petition for Hearing filed in the California Supreme Court, she devoted the bulk of the discussion of "Legal Questions and Issues", pages 9-28 to matters designed to show a violation of her rights under the Fourteenth Amendment to the United States Constitution. Many of these are repeated or incorporated in the questions presented in this appeal.

The Questions Are Substantial.

As a mother with limited resources and prime responsibility for the support of her seven children, appellant is naturally and obviously vitally concerned with the outcome of this case. But the issues raised pose unique and hitherto unresolved constitutional questions of great and widespread impact to groups of people with low income and resources throughout the United

States who derive support from governmental welfare aid payments.

The precedents established by this Court not only do not support the judgment here under attack but in view of its constitutional deficiencies require its reversal. Here pertinent in principle in addition to the cases cited under the "Jurisdiction" category, *supra,* are the following:

> *Baggett v. Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377;
>
> *Albertson v. Subversive Activities Control Board,* 382 U.S. ...., 86 S. Ct. 194, 15 L. Ed. 2d 165;
>
> *United States v. Romano,* 382 U.S. ...., 86 S. Ct. 279, 15 L. Ed. 2d 210.

Jacobus ten Broeck, professor of Political Science at the University of California, was for the thirteen year period, 1950-1963, a member of the California State Social Welfare Board and during the latter three years its Chairman. He brought unique background and ability to bear on a study in depth of problems affecting the poor entitled: "California's Dual System of Family Law: Its Origin, Development and Present Status".[8] Many of his observations underscore the substantial nature of constitutional issues with which we are concerned in the present case. He says:

> "Family law in California is not single, uniform, and equal as to all families whatever their status, condition or wealth. On the contrary, it is dual and distinguishes among families on the basis of

[8] 16 Stanford L. R. 257, 900 (1964); 17 Stanford L. R. 614 (1965).

poverty. It is therefore discriminatory as to the groups which are the principal victims of poverty: racial and ethnic minorities, the economically, socially, and educationally underprivileged, children of broken homes, the aged, the physically and mentally handicapped."

16 Stanford L. R. 900, 978.

"In the context of family law, no less than in school racial segregation, one might ask whether 'separate' is not 'inherently unequal,' generating among aid recipients 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in ways unlikely ever to be undone.'"

16 Stanford L. R. 257, 258, quoting from *Brown v. Board of Education,* 347 U.S. 483, 494.

"Although the recipients of public aid programs are still effectively outside the jurisdiction of the United States Constitution, a new spirit in constitutional law has given positive signs of its future potential."

17 Stanford L. R. 614, 681.

Professor Charles A. Reich of Yale University has similarly observed:

"Today the nation's poor stand as far from the enjoyment of basic rights as did the Negro at the beginning of the Civil Rights movement."

Industrial Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1256 (1965).

There has recently been considerable airing in the public news media of welfare matters involving circumstances like those in the instant case. In a report of an interview with one Paul D. Ward, it was said of him:

> "He supervises the California administration of the Department of Social Welfare, Mental Hygiene, Rehabilitation and Public Health. He compares the comprehensive assignment to that of the Secretary of Health, Education and Welfare in the national government."
>
> Los Angeles Herald Examiner, Section B, Second Front Page, February 10, 1966, article entitled: Poor Being Used as Scapegoat.

On February 17, 1966, well known columnist Paul Coates devoted a column to the problem of unrelated adult males living in a home receiving welfare payments for needy children, saying in conclusion:

> "On the other hand, if he is employed, the BPA doesn't interfere.
>
> It is a sordid design for living, yet we must accept it. The only other solution—denying assistance to the children in such homes—is unthinkable.
>
> Punishing a child for the sin of the parent would be a truly immoral act."
>
> Los Angeles Times, February 17, 1966, Part I, page 3, article entitled: Sin Dims the Dole.

This points up what has not so far been directly mentioned in the preceding material of this Jurisdictional Statement, namely, that in the case of welfare payments made for the benefit of needy children the certainty of their receipt by the children entitled to them ought to be made paramount and not merely presumed and not subordinated or sacrified to the devious attempt to impose differing moral behavior standards, or doubtful liabilities or criminal sanctions on nonconforming, associated adults. The columnist appears to have misunderstood or been misinformed. It is precisely the policy of the welfare department, legally sanctioned, to do the "unthinkable" and to perform the ". . . truly immoral act." Under the statute with which we are concerned and the derivative welfare department rules, it is entirely possible and probable that the needy children receive nothing more substantial than the bare bones of a presumption grounded on a rationalization of expediency with varying fictional content.[4]

What a simple matter it would be to require aid recipients to certify monthly under appropriate penalty all income received from any source during the preceding month. Thus easily would violation of their constitutional rights and those of their children be avoided.

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[4]In the present case, the children benefited from receipt of the normally computed aid payments. Their mother, appellant, was however convicted of crime for such receipt. If the conviction stands, there will be ultimate family deprivation since a civil action lies to recover the sums involved under California Welfare and Institutions Code Section 11483 (former Section 1506).

Conclusion.

The questions of violations of Federal constitutional rights herein presented and arising from the facts of this case are deeply important to appellant; they have not heretofore been decided by this Court; they have and will continue to have widespread and increasing public significance and application. They are substantial in nature according to the requirements of this Court.[5] It is respectfully submitted that probable jurisdiction should be noted.

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[5]Rule 15 (e); *Zucht v. King*, 260 U.S. 174, 176-177; *Hamilton v. Regents of University of California*, 293 U.S. 245, 258.

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APPENDIX A.

In the Superior Court of the State of California, in and for the County of Orange, Dept 2.

Court convened at 9:30 A.M. September 14, 1964, present Hon Robert Gardner, Judge; Stanford E. Shaw, Deputy Clerk; L. A. Brussow, Deputy Sheriff; Lecil Slaback, Reporter; and the following proceedings were had:

C-14388 People vs Ford

Hearing re: Submission on transcript.

Defendant in court with counsel Thomas Gurry. People represented by B. Schlegel, Deputy District Attorney. Defendant waived her right to a jury trial and to be confronted by witnesses against her. Defendant's counsel concurred in the waiver. Arguments by counsel commenced. Defendant applied for probation. Hearing re: probation and pronouncement of judgment as to Counts 1, 2, 3 and 4 set for October 29, 1964 at 1:30 p.m. in Dept. 2. Court finds the defendant guilty of all 4 counts in the information, but the Court deems all counts to be misdemeanors. Entered 9-17-64

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In the Superior Court of the State of California, in and for the County of Orange Dept. 2.

Court convened at 1:30 P.M. November 19, 1964, present Hon. Robert Gardner, Judge; Stanford E. Shaw, Deputy Clerk; L. A. Brussow, Deputy Sheriff; Lecil Slaback, Reporter; and the following proceedings were had:

C-14388 People vs Ford

Hearing re: Probation and pronouncement of judgment.

Defendant in court with counsel Robert Kotchick. People represented by B. Schlegel, Deputy District Attorney. Court advised the defendant he had read and considered the probation report. Probation denied. No legal cause appearing why judgment should not now be pronounced, and the defendant having duly been found guilty to the crime of a misdemeanor, Violation of Section 484-488 Penal Code, (four counts), it is the judgment of the Court that the defendant be sentenced to the Orange County Jail for six months on each count, a total of four counts, six months as to each count. The court further ordered this sentence run consecutively. Bail exonerated upon reporting to Orange County Jail. Court ordered stay of execution until November 23, 1964 at 9:00 a.m. The Court suspends one day of the said sentence so that it may be modified if Probation Department suggests.

Entered 11-20-64

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APPENDIX B.

Opinion of the District Court of Appeal.

In the District Court of Appeal, Fourth Appellate District, State of California.

The People of the State of California, Plaintiff and Respondent, v. Loretta L. Ford, aka Loretta L. Phelan, Defendant and Appellant. 4 Crim. No. 2162.

Filed Aug. 9, ~~1965~~ 1965

Appeal from a judgment of the Superior Court of Orange County. Robert Garner, Judge. Affirmed.

William C. Rau, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General and Thomas Kerrigan, Deputy Attorney General, for Plaintiff and Respondent.

This is an appeal from a judgment of conviction of four counts of grand theft of Aid to Needy Children funds (Pen. Code, §§484-487), covering the period from August, 1963 through March, 1964. The trial court deemed all counts to be misdemeanors.

Defendant and her children were receiving a welfare grant in December, 1962. At that time she told a Welfare Department Social Worker that no unrelated adults lived with her family and that Anthony Vitone, the father of one of her children was living elsewhere. Defendant swore in writing that all the information furnished the Welfare Department in connection with her application for Welfare funds was true and that she would notify the Welfare Department of any information regarding Vitone's return to her home.

The Social Worker again saw defendant in April, 1963 and obtained a sworn statement regarding restoration of aid; observerd she was pregnant; defendant said Anthony Vitone was the father, In May, 1963, defendant applied for additional welfare funds for the unborn child. She affirmed under oath that Vitone was the father.

As early as 1960 both Vitone and defendant had been told of the consequences of his living with her. This warning was given them by an investigator from the District Attorney's office. Vitone denied responsibility to support defendant because he was not living with her.

In July, 1963, Vitone gave his employer defendant's address as his residence. The employer later saw Vitone's automobile at defendant's residence.

On October 7, 1963, defendant wrote her Welfare Department Social worker that Vitone was staying in the house, paying room rent. She was promptly told that, since he was living in her home, his total income would have to be considered in the family budget. This meant that if his net earnings exceeded the amount of aid she would receive if he were absent from her home, her payments would be terminated. On November 5, defendant told the welfare Department that Vitone had moved out of her house as of October 15.

Vitone was found at defendant's house by the Social Worker at 9:00 a.m. in late December, 1963. In early January, 1964, defendant signed another Welfare Department form necessary for continuing aid; she again declared there were no unrelated adults living at her residence.

From March 25 to April 17, 1964, a welfare Fraud Investigator watched defendant's residence about fifteen times. On each occasion the investigator saw Vitone in the house at night, or leaving in the morning, or saw Vitone's truck parked in the driveway at night with the house lights out.

Vitone's total income for the period from August, 1963, through March, 1964 was $3,883.00: under the appropriate Welfare Department regulations, appellant received overpayments of $2,066.00 in Aid to Needy Children funds during this period. The overpayments exceeded $200.00 for each of the four periods named in the information.

Defendant contends that the evidence is insufficient as a matter of law to support a conviction of any of the four counts of grand theft. Welfare and Institutions Code, section 1508 provides:

> "where a needy child . . . lives with his mother and a stepfather or an adult male person assuming the role of spouse to the mother although not legally married to her, the amount of the grant made pursuant to Section 1511 of this code shall be computed after consideration is given to the income of the stepfather or such adult male person . . ."

The intimate relationship between defendant and Vitone and his recurrent presence in her home readily qualify him as the statutory "adult male person assuming the role of spouse to the mother although not legally married to her." (*County of Kern v. Coley*, 229 Cal. App. 2d 172, 179.)

The charges of grand theft are premised on obtaining welfare funds by false pretenses, which constitute theft by false representation or by false pretenses as defined in Penal Code, section 484. (*People v. Darling*, 230 A.C.A. 676, 678.)

The evidence of guilt of each charge is ample and obvious. The requisite fraudulent intent is clearly present in (1) defendant's knowledge that her payments by the agency would be reduced according to Vitone's income if the agency knew that he was living in her home, and (2) her promises, made without intent to keep them, to inform the agency if Vitone were to return to her home. (*People v. Wood*, 214 Cal. App. 2d 298, 306; *People v. Flores*, 197 Cal. App. 2d 611, 615; *People v. Phipps*, 191 Cal. App. 2d 448, 453.)

The constitutionality of Welfare and Institutions Code, section 1508, *supra*, is placed in issue by defendant. She contends that it violates due process because (a) the statutory terms are vague and uncertain, (b) it creates an arbitrary presumption (actual receipt by the mother of income from the "adult male person"), and (c) it discriminates against *unmarried* persons with families. These contentions have no merit. The language is clear, certain, and capable of definite interpretation. (*People v. Rozell*, 212 Cal. App. 2d 875, 878.) The statutory presumption is reasonable and practical; otherwise, there would be a premium on illicit relationships which would operate as a deterrent to marriage of the parties (*People v. Shirley*, 55 Cal. 2d 521, 525; *County of Kern v. Coley, supra*, 229 Cal. App. 2d 172, 178). There is no discrimination. Where a legally married couple is eligible for Aid to Needy Children funds and is living together, the income of the husband is con-

sidered, as was that of Vitone (the statutory "adult male person . . .").

Even assuming there is a discrimination against unmarried persons with families it is particularly inappropriate that defendant, living in a meritricious relationship, assert this. Her actions provide the paradigm case of the statute as a reasonable device to safeguard the funds of the commendable Aid to Needy Children program from larceny.

The judgment is affirmed.

Gerald Brown, *P. J.*

We Concur:

Coughlin, *J.*

Whelan, *J.*

END